Book Review

Living with Land Use Exactions

Regulation for Revenue: The Political Economy of Land Use Exactions, by Alan Altshuler* & José A. Gómez-Ibáñez.** Washington, D.C.: The Brookings Institution; Cambridge, Mass.: The Lincoln Institute of Land Policy, 1993. 175 pages.

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In their apparently never-ending search for new ways to pay for capital infrastructure without raising general tax rates, local governments have increasingly turned to developers as the source of funding for numerous improvements. Known generically as exactions, the costs imposed on new commercial and residential development range from dedication of land for public improvements to fees to fund public services such as roads and utilities, and, less commonly, to requests for developer contributions to day care facilities and other social programs.[1] In their recent monograph, Professors Altshuler and Gómez-Ibáñez trace the historical development and current scope of land use exactions and challenge some of the common wisdom about the fairness and efficiency of exaction strategies. Their concise volume should

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1. As the authors note, the more traditional exactions are defended as a means of mitigating the negative physical effects of development, whereas requiring a developer to contribute, for example, to the provision of day care or affordable housing extends the scope of exactions to include mitigation of the "social byproducts of new land uses." ALAN A. ALTSHULER & JOSÉ GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE 4, 42 (1993) [hereinafter REGULATION FOR REVENUE]. While some of these social exactions are accomplished through a straightforward imposition of a fee or dedication requirement, the zoning ordinance can also be used. Through the technique of inclusionary zoning, a local government requires a developer of land to devote a certain percentage of the development to low and moderate-income housing. Although inclusionary zoning could be considered a form of exactions, the authors have excluded inclusionary zoning from the scope of their study. *Id.* at 5-6.

stimulate parties on both sides of this political planning issue. For the pro-exaction forces, Altshuler and Gómez-Ibáñez's analysis of fairness and efficiency concerns should temper their zeal for pinning all costs on the developer. At the same time, the anti-exaction forces should consider carefully the strong dose of real-world pragmatism in the authors' conclusion that exactions may be preferable to most of their alternatives.

While recognizing that the increasing scope and frequency of exactions can be seen as an incremental evolution, the authors identify the early 1970s as a period of fundamental change in local government exactions practice. Although others have simply noted the increased magnitude and popularity of exactions,[2] Altshuler and Gómez-Ibáñez identify seven distinct historical trends underlying changes in exactions practice: neighborhood activism, environmental awareness and regulation, taxpayer revolts, decreasing federal aid, infrastructure backlog,[3] increasing government mandates, and the development of fiscal impact analysis. Local fiscal crises, coupled with generally relaxed and deferential judicial review at the state level, created a favorable political and legal environment for the rapid spread of exactions. The precise cost of exactions is difficult to measure, because they typically involve particularized negotiation rather than application of a predetermined formula, and because many exactions consist of in-kind transfers rather than direct revenue contributions. The authors, nevertheless, present a convincing array of fiscal studies to document their assertion that, in terms of the sheer dollar magnitude of exactions, the range of their purposes, and the number of communities involved, a true "exaction revolution" has occurred.[4]

Fundamental to this shift in infrastructure financing was a concurrent attitudinal change about growth itself. Before the 1970s, community growth was seen as a stimulus to population increases and economic growth through higher real estate values. Because the community as a whole benefitted from growth, distributing the cost of infrastructure through general taxation was not objectionable. Since the 1970s, however, that conventional wisdom has been rejected. Growth is frequently seen as a drain on the local community, rarely producing adequate revenue to pay for the burdens it imposes on the public infrastructure. Thus, the pre-1970 attitude that the beneficiary of growth should pay for the growth has remained intact; what is new since 1970 is the

2. *See, e.g.*, Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515 (1988) [hereinafter Taub, *Exactions*]; Donald L. Connors and Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69 (1987); Nicholas V. Morosoff, Note, *"'Take' My Beach Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823 (1989).

3. For example, the authors note that between 1960 and 1984, public sector spending on infrastructure declined from 2.3% of the gross national product to 1.1%. REGULATION FOR REVENUE, *supra* note 1, at 26.

4. *Id.* at 8, 34-41.

identification of the developer, rather than the general community, as the supposed beneficiary.

I. Fairness Concerns

The main rallying point for those who promote and impose local exactions is the assertion that it is only fair to put the cost of new infrastructure on those who have created the infrastructure strain. As a statement of public policy, this assertion reflects at least three underlying assumptions: first, that it is more equitable to allocate the cost of capital and other improvements to the developer than to spread the cost equally on the entire community through general revenue raising devices; second, that because existing development already paid its own way, new development should follow suit; and third, that the local government can accurately measure the true cost imposed on capital infrastructure by growth. Altshuler and Gómez-Ibáñez persuasively challenge all of these unstated underpinnings of most exaction techniques.

Although exactions are consistent with the premise that it is unfair to impose the cost of development on the existing community, the authors highlight other equitable criteria that may be overlooked in the rush to recover the cost of new infrastructure. In various fairness equations, exactions appear less fair than several alternatives. If, for instance, equitable concerns dictate that those assessed for the cost of infrastructure should pay no more than their pro rata contribution to the demand for that infrastructure, or that the cost of public infrastructure ought to be allocated on the basis of ability to pay, or that a community should not discriminate against newcomers,[5] then exactions begin to look less fair than, for example, well-structured user fees. Thus, although exactions may seem fair because they place the cost of new infrastructure demands on the supposed culprit, they also discriminate against younger property owners[6] and have the regressive redistributional effect of favoring more affluent over poorer households.[7]

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5. One study of exactions in Loveland, Colorado, supports the authors' claim that not only do exactions discriminate against newcomers, they also provide a windfall to existing homeowners. When the price of newly developed property rises because it must absorb the cost of the exactions, the price of existing property will also rise because both types of property operate in the same market. *Id.* at 49, 105. This type of discrimination is unlikely to find redress in the courts. In fact, in some states, discrimination against newcomers even extends to the property tax. In Nordlinger v. Hahn, 112 S.Ct. 2326 (1992), the Supreme Court gave its blessing to California's property tax assessment formula, which calculates the assessed value of real property in the state according to its 1975 assessed value or its date of acquisition, whichever is later.

6. A preference for existing over new homeowners translates into a preference for older over younger owners, because existing homeowners are more likely to be older than new home buyers. REGULATION FOR REVENUE, *supra* note 1, at 105.

7. The authors point out that because exactions are typically calculated on a per unit cost, the burden on lower income units will be proportionally higher than the burden on more expensive units. In the absence of waivers for low income purchasers, then, exactions may be regressive in their effects. *Id.* at 97, 106-10.

Moreover, even if the proponents of exactions remain steadfast in their conviction that the most compelling criterion of fairness is that existing property owners should not shoulder burdens created by new property owners, the authors raise serious concerns about whether exactions accurately measure and allocate the costs of that new infrastructure. Stated simply, Altshuler and Gómez-Ibáñez forcefully repudiate the proposition that growth alone causes increased demand for infrastructure. In their discussion of increased demand for highways, for example, they highlight numerous sources in addition to new growth: the rise in the number of households with two working adults; individual decisions to rely on private rather than public transit; aggressive automobile sales campaigns; and decisions by businesses not involved in land development in siting their offices, factories, and commercial enterprises.[8] Although their conclusion that "[d]evelopment generally is a less important cause of increasing infrastructure demand than other forces, such as rising standards for infrastructure services and rising income"[9] appears somewhat overstated on the basis of the evidence adduced, the authors demonstrate nonetheless that because local governments usually overlook these concurrent sources of infrastructure demand, they will routinely overassess new growth for its share of the cost of new infrastructure.[10] In addition, they suggest that in the decades before 1970 the general willingness to spread the costs of infrastructure among the broader community may have been based on an erroneous assumption that growth in that era did in fact pay its own way. If they are correct in their suggestion that local governments in the 1950s and 1960s understated the costs of growth, exactions become doubly perverse: not only did pre-1970 development manage to escape the direct assessment of its true cost on infrastructure by spreading those costs among the general community, it now effectively imposed those costs on the next generation of development.

II. Efficiency Concerns

Professors Altshuler and Gómez-Ibáñez briefly dissect the assertion that exactions encourage economically efficient land use development and infrastructure allocation. Their analysis of the literature concludes that although exactions rarely generate efficiency gains, they may be less inefficient than alternative ways of funding infrastructure improvements. In short, the authors see two major incentives for inefficient calculation of exaction charges. First,

8. *Id.* at 12.

9. *Id.* at 62.

10. The authors do note, however, that even with a strong consensus that development should pay for its contribution to infrastructure strain, current allocation methods typically underestimate the cost of new infrastructure, which in turn results in underassessment in exaction calculation. *See* discussion *infra* Part II.

local governments do not consider the extraterritorial impacts of development, and may thus underestimate its true cost. Second, most local governments use exaction formulas that understate the costs of infrastructure, in part to avoid legal challenge and in part to remain competitive in the marketplace.[11] Most formulas, for example, deduct funds available from other government grants and other sources of general revenue contributions, such as gasoline taxes and local property taxes. Well-structured user fees, the authors suggest, could promote more efficient land development and allocation of funds to infrastructure.

At first glance, Altshuler and Gómez-Ibáñez's conclusion that local governments actually undercharge developers for infrastructure improvements may appear inconsistent with their assertions throughout the book that exactions unfairly charge development for infrastructure demand it alone did not create. These two arguments taken in tandem suggest, however, that exactions in their totality may actually strike a roughly accurate balance between, on the one hand, the desire to make growth pay its own way and, on the other, the recognition that not all new infrastructure demand is caused by growth. For example, the authors observe that, when setting development impact fees, local governments typically deduct from the estimated cost of the impacts the amount of funds available from other general revenue sources.[12] This practice may simply reflect a local government's awareness that, on fairness grounds, some of the cost of infrastructure improvement should be shouldered by the general community.

III. Legal Constraints

The Supreme Court's decision in *Nollan v. California Coastal Commission*[13] has been widely interpreted as imposing a federal constitutional minimum standard that requires an essential nexus between the conditions or requirements imposed on developments and the needs generated by that development.[14] Commentators have suggested that *Nollan* requires state courts

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11. Professor Vicki Been has suggested that competition in the marketplace of municipalities will prevent a municipality from imposing unfair exactions on developers and will itself deter inefficient land development patterns. Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991). That thesis has been challenged in a recent article. Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831 (1992).

12. REGULATION FOR REVENUE, *supra* note 1, at 115.

13. 483 U.S. 825 (1987).

14. *See, e.g.*, Been, *supra* note 11, at 476; Michael M. Berger, *First English Redux: A Kafkaesque Encounter in Court*, LAND USE L. & ZONING DIG., Aug. 1989, at 3, 4; William A. Falik & Anna C. Shimko, *The "Takings" Nexus - The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 380, 390-91 (1988); Robert H. Freilich & Stephen P. Chinn, *Finetuning the Taking Equation: Applying it to Development Exactions, Part 2*, LAND USE L. & ZONING DIG., Mar. 1988, at 3, 4; Frank Michelman, *Takings*, 88 COLUM. L. REV. 1600, 1601 (1988); Terry D. Morgan, *Municipal*

to invalidate exactions that have no "substantial causal relationship"[15] to the needs generated by the development. In fact, however, the *Nollan* Court did not reach that issue. In *Nollan*, the Supreme Court was concerned, not with the relationship between the exaction and the demand placed on local infrastructure by the proposed development, but rather with the relationship between the exaction and the police power objective furthered by the exaction policy.[16]

All exactions involve a relationship among three interdependent elements: the policy goal furthered, the condition or fee imposed, and the strain on the infrastructure caused by the development. The validity of the exaction depends on the relationship between the exaction and the goal, and that between the proposed development and infrastructure needs. The *Nollan* Court, which was concerned only with the former relationship, invalidated the California Coastal Commission's requirement that the Nollans grant the public a lateral easement along their beachfront, not because it believed that the Commission had erroneously concluded that the proposed development would significantly decrease visual access to the beach, but rather because the Court concluded that the exaction did not rationally further the Coastal Commission's police power objective of preserving visual access.[17] Numerous state court opinions, however, have specifically considered the latter relationship, and have adopted a wide range of tests for determining how close the fit must be between the exaction imposed and the demand for infrasturcture created by development.[18]

Responses to the Supreme Court's New Regulatory Taking Options, LAND USE L. & ZONING DIG., Nov. 1987, at 3, 4; Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731 (1988); Norman Williams, Jr., *A Narrow Escape? Part 2*, 16 ZONING AND PLANNING REPORT 121 (1993).

15. Taub, *Exactions*, *supra* note 2, at 579. *See also* Linda J. Bozung, *Exactions, Dedications and Impact Fees*, *in* HANDLING LAND USE AND ENVIRONMENTAL PROBLEMS OF REAL ESTATE 1991, at 245-48 (PLI Real Estate Law and Practice Course Handbook Series No. 367, 1991).

16. In *Nollan*, the Court invalidated the Coastal Commission's attempt to require beachfront property owners to dedicate an easement across their property in exchange for permission to replace a small, existing cabin with a larger modern home. Justice Scalia, writing for the majority, assumed that the Commission's objective of increasing visual access to the beach constituted a valid governmental purpose. On that basis, then, the Commission could have prohibited the denser development proposed by the landowners. Similarly, Scalia suggested, the Commission could have imposed conditions on the development that would have furthered the objective of preserving visual access, such as requiring the Nollans to construct a "viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Nollan*, 483 U.S. at 836. The lateral access easement required by the Commission, however, did nothing to promote the Commission's stated goal of preserving visual access of the beach: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838. Lacking the "essential nexus" to a legitimate government purpose, the easement was invalidated by the Court as an illegitimate taking of property.

17. The Court observed: "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." 483 U.S. at 837.

18. These state court tests range from a more deferential test requiring the local government to establish only that there is a reasonable relationship between the project and the burdens created, to a more stringent test that limits the local government's ability to impose the cost of infrastructure on a new development unless the need for the infrastructure is "uniquely attributable" to the development project. In fact, the *Nollan* Court cited to this large group of state court cases with apparent approval. 483 U.S. at 839-40.

The Supreme Court is currently considering its first exactions case since its 1987 decision in *Nollan*. In *Dolan v. City of Tigard*,[19] the Court will review the Oregon Supreme Court's decision upholding the imposition of two exactions on a landowner who sought to replace an existing commercial building with a larger structure. *Dolan* clearly addresses Altshuler and Gómez-Ibáñez's concerns about the extent to which the local government should be required to establish that the need for the infrastructure is in fact attributable to the development subject to the exaction. In this case, the city conditioned its permission for development on the landowners' conveyance of a 15-foot easement for storm water management and an 8-foot easement for a bicycle pathway. The Oregon court found that the conditions were legitimate, because it concluded that the expanded use of the property would generate additional vehicular traffic and would increase storm water runoff by covering a larger portion of the land than does the existing development.

Justice Peterson's dissent in *Dolan* finds in the city's exactions the same weaknesses documented by Professors Altshuler and Gómez-Ibáñez. First, it criticizes the majority for upholding the bicycle pathway easement on the basis of the city's generalized conclusion that the completed pathway system "could offset some of the traffic demand" generated by the new development.[20] With regard to the flood control easement, the dissent found even less justification in the city's imposition of an easement because the property drains into a creek with serious existing drainage problems. The dissent argued that the city should only be able to impose on the property owners exactions that directly ameliorate negative conditions caused by their development proposal. Yet the city made no precise determinations of the increase in runoff to be expected from the new commercial building. The analysis of Altshuler and Gómez-Ibáñez reinforces the *Dolan* dissent's complaint that the city has not allocated the cost of development fairly; thus, this case presents a clear opportunity for the Supreme Court to consider many of their observations.

IV. Policy Concerns

Economic analysis suggests that the current exactions environment unfairly singles out new development to bear the cost of infrastructure demands it alone did not create, but the Supreme Court may nonetheless decline to impose demands for financial precision on local governments. After all, the Court has frequently noted how government must be allowed to operate within a fairly generous margin of error.[21] Moreover, the Court has squarely rejected similar

19. 854 P.2d 437 (Or. 1993), *cert. granted*, 114 S. Ct. 544, No. 93-518 (1993).

20. 854 P.2d at 447.

21. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365, (1926), the case in which the Supreme Court upheld the constitutionality of zoning for the first time, the Court stressed: "[t]he inclusion of a

economic fairness arguments with regard to the cost allocation involved in historic preservation, noting simply that although government condemnation of historic property may more equitably distribute the cost, "widespread public ownership of historic properties . . . is neither feasible nor wise."[22] And in fact, Professors Altshuler and Gómez-Ibáñez may not be too unhappy with a less than precise judicial approach to exactions, because they themselves recognize that in the real world, exactions are better than many of the potential alternatives.

Although exactions may be unfair and inefficient, the authors suggest that it is unrealistic to expect that the current fiscal and political climate will see them replaced by a superior cost allocation method, such as general taxation or sophisticated user fees. According to this line of reasoning, if the Supreme Court does adopt a stricter level of review of exactions, thereby making local governments less likely to adopt them, that holding by the Court might have the unfortunate effect of leading governments to adopt even more regressive and inefficient solutions. For example, the authors squarely reject growth controls as inflationary and unfairly providing a windfall to existing property owners whose land would thus compete in an artificially restricted market. Similarly, and perhaps in response to concerns about the scope of *Nollan*'s nexus constraints, some commentators have advocated the adoption of a local excise tax on development that would replace exactions without spreading the cost of development to the general community.[23] This alternative seems to single out development much as exactions do, without the concomitant nexus requirement that at least imposes some restraint on those responsible for imposing local exactions.

In the final analysis, Altshuler and Gómez-Ibáñez's volume does an outstanding job of revealing the flaws in the thinking of the proponents of exactions, while at the same time recognizing the political and sociological forces exaction opponents should acknowledge. The "make growth pay its own way" attitude is not likely to go away soon, nor, as the authors suggest, are the courts likely to impose a more stringent standard of review on local exactions formulas and negotiated efforts. As a result, although Altshuler and Gómez-Ibáñez's conclusion that exactions are better than the even-more-undesirable alternatives may displease the anti-exaction forces, their insightful

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reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." *Id.* at 388-89. *See also* Village of Belle Terre v. Boraas, 416 U.S. 1, 4 (1974); Dandridge v. Williams, 397 U.S. 471 (1970) ("If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"); Metropolis Theater Co. v. Chicago, 228 U.S. 61, 69-70 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.").

22. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 109 n.6 (1974).

23. Gus Bauman & Michele M. Rosenfeld, *Update on Exactions, Dedications, and Impact Fees*, C629 ALI-ABA 133 (1991).

documentation of the trends that created this climate suggests that they are correct in their pragmatic assessment of real-world options. The book is cogent and persuasive without being doctrinaire. Its insights are provocative to both sides of the exactions debate, and it provides a wealth of historical evidence and political analysis in an extremely readable and tightly organized volume.